

GUIDELINES
AGRICULTURAL STEWARDSHIP ACT
July 1, 2000

NATURE OF GUIDELINES

The Agricultural Stewardship Act¹ ("ASA" or "Act") requires that the Commissioner of Agriculture and Consumer Services ("Commissioner") develop guidelines to assist in the implementation of the ASA. These guidelines are not regulations, and no one is required to abide by them. In fact, there are no regulations concerning the ASA. The only document that anyone must abide by is the ASA itself.

These guidelines are simply advice on how to implement the ASA. The Commissioner expects that these guidelines will be reviewed periodically to determine whether changes are needed.

The Commissioner welcomes your questions and requests for information about the ASA Program. All correspondence regarding the ASA guidelines can be directed to the address listed below or you can contact the ASA Program at 804/786-3538.

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**BACKGROUND ON THE
AGRICULTURAL STEWARDSHIP ACT**

During the past seven to 10 years, a number of federal and state laws and regulations have been proposed that would have created strict rules to prevent pollution by governing the way we farm. Only a few of these proposed laws and regulations were adopted, but public opinion polls show that the public continues to value a clean environment. In the 1990 census, Virginia had for the first time more people living in urban and suburban areas than in rural areas. Of the nonpoint sources of pollution, due to the vast number of acres in agriculture, agriculture is a major contributor of nutrients and sediments to rivers, streams and lakes. Given the public's continued support for a clean environment, Virginia's increasing urbanization, and the recognition that most farmers are good stewards of the land, Virginia's agricultural leadership decided to take a proactive approach to water pollution coming from agricultural lands.

Virginia's agricultural leadership sought a way of dealing with agricultural water pollution that was different from the approaches used with other industries, such as manufacturers. Most manufacturing plants must obtain permits and follow strict rules of operation. The agricultural community wanted a different approach that did not rely on permits and strict operating rules, but took into account the wide variety of farming practices used in Virginia.

The ASA resulted from the joint work of representatives of Virginia's agricultural community, environmental community, Association of Soil and Water Conservation Districts, and state agencies. They sought to develop procedures by which individual agricultural producers can be alerted to areas of their operations that may be causing water pollution. Rather than developing regulations with strict rules governing every type of farming practice, the ASA looks at each farm individually.

¹ Article 3.1 (§ 10.1-559.1 et seq.) of Chapter 5 of Title 10.1 of the Code of Virginia.

ABBREVIATIONS AND DEFINITIONS

Where personal pronouns are used, "he" and "she" are used interchangeably. The following terms and abbreviations, when used in these guidelines have the following meanings:

Act or ASA	Agricultural Stewardship Act
BMP	Best management practice
Board	Virginia Soil and Water Conservation Board
Commissioner	Virginia Commissioner of Agriculture and Consumer Services
Complainant	Person who submits complaint to Commissioner pursuant to ASA
DCLS	Division of Consolidated Laboratory Services
DCR	Virginia Department of Conservation and Recreation
DEQ	Virginia Department of Environmental Quality
District	Soil and Water Conservation District
Extension	Virginia Cooperative Extension
Farmer	Agricultural producer, whether owner or operator of farming operation in question.
FOTG	USDA, NRCS' Field Office Technical Guide
FSA	USDA, Farm Service Agency
Initial investigation	First investigation of a complaint to gather information so that the Commissioner can determine whether or not the agricultural activity in question is creating or will create pollution.
Jurisdiction	Authority to do something under the ASA or other law
NRCS	USDA, Natural Resources Conservation Service
SWCB	State Water Control Board (a.k.a. Virginia Water Control Board)
USDA	United States Department of Agriculture
VDACS	Virginia Department of Agriculture and Consumer Services
VPA	Virginia Pollution Abatement permit from SWCB
VPDES	Virginia Pollution Discharge Elimination System permit from
SWCB	State Water control (a.k.a. Virginia Water Control Board)
VWCB	Virginia Water Control Board (a.k.a. State Water Control Board)

BRIEF SUMMARY AGRICULTURAL STEWARDSHIP ACT

The procedures created by the ASA begin with a complaint made to the Commissioner. The Commissioner must accept complaints alleging that a specific agricultural activity is causing or will cause water pollution. Not all complaints must be investigated, however. After the Commissioner receives a complaint and the complaint is one that must be investigated, he will ask the local Soil and Water Conservation District ("District" or "local district") whether it wishes to investigate the complaint. If the District does not wish to investigate the complaint, the Commissioner will. (A copy of the ASA is in Appendix A.)

The purpose of the investigation is to determine whether the agricultural activity (that was the subject of the complaint) is causing or will cause water pollution. If not, the Commissioner will dismiss the complaint and inform the person who made the complaint ("complainant").

If the agricultural activity is causing or will cause water pollution, the ASA gives the farmer an opportunity to correct the problem. The farmer will be asked to develop a plan containing "stewardship measures" (often referred to as "best management practices") to prevent the water pollution. The farmer then develops the plan, and once the plan is complete, the District reviews it and makes recommendations to the Commissioner. If the Commissioner approves the plan, he will then ask the farmer to implement the plan within specified periods of time.

If the farmer fails to implement an approved plan, enforcement action under the ASA will be taken against the farmer.

In some cases, the ASA investigation will not produce sufficient evidence to support the conclusion that the agricultural activity in question is causing or will cause pollution. In those cases, the investigator will see if the farmer is receptive to suggestions on how the farmer might improve his practices to prevent complaints in the future. This educational role of the investigator is just as important as anything else the investigator does pursuant to the ASA.

SECTION A - WHAT THE ACT COVERS

1. Activities Covered by the ASA

The ASA applies to agricultural activities that are causing or will cause water pollution by sedimentation, nutrients or toxins. The only exception is when the agricultural activity in question is already permitted by the State Water Control Board (through the Department of Environmental Quality). The permits are usually: a Virginia Pollution Abatement ("VPA") permit (general or individual) for the storage and land application of animal waste; a Virginia Pollution Discharge Elimination System ("VPDES") permit for certain aquaculture facilities or for mixed production and processing operations; or a VPA permit for the land application of sewage sludge.

The ASA does not apply to forestry activities, nor does it apply to odor concerns. Nor does the ASA apply to landfills. In terms of waste problems, the ASA would only apply to farm dumps where agricultural products or animal carcasses are disposed of and that have clear water quality impacts. Finally, the ASA does not apply to air pollution, nor does it apply to water pollution caused by nonagricultural activities.

If a complaint alleges that a farming operation is causing unpleasant odors, for example, neither the Commissioner nor the local District has the authority to investigate the complaint or to take any other action under the ASA. In that case, the Commissioner would inform the complainant that the ASA does not give authority to deal with anything other than water pollution.

The Commissioner's staff will use Form 1 to determine whether or not the complaint can be investigated under the ASA.

2. Definitions of Sedimentation, Nutrients and Toxins

Sedimentation is soil material, either mineral or organic matter, that has been transported from its original site by air, water, or ice through the force of gravity and has been deposited in another location. The primary focus under the ASA will be on erosion of soil and its deposition in adjacent surface water.

Nutrients are dry or liquid materials that provide elements, such as nitrogen, phosphorus, and potassium, that can nourish plants. Commercial fertilizers and animal manure are the two primary sources used to supply nutrients to plants in agricultural operations, and will be the focal point of the ASA.

For the purposes of these guidelines, a toxin is any substance or mixture of substances intended to be used to prevent, destroy, repel or mitigate agricultural pests, or to be used as a plant regulator, defoliant or desiccant, commonly called pesticides. In addition, oil, gasoline, diesel fuel and other petroleum products are potentially toxic materials that are usually employed in farming operations.

Each of these potential pollutants -- soil, nutrients, pesticides, oil, gasoline and other petroleum products -- are good and useful things when they are kept in their proper places. It is only when any of these things reaches a stream, river, well, lake or other water body that they become a problem.

3. What the Act Means by "Pollution"

The ASA defines pollution as "any alteration of the physical, chemical or biological properties of any state waters resulting from sedimentation, nutrients, or toxins." (§ 10.1-559.1 of the ASA.) This means that when sediments, nutrients or toxins enter the water from an agricultural activity, they constitute pollution under the ASA.

However, even if pollution is occurring, the ASA gives the Commissioner the power to dismiss a case if the Commissioner determines that:

". . . the pollution is the direct result of unusual weather events or other exceptional circumstances which could not have been reasonably anticipated, or determines that the pollution is not a threat to human health, animal health, or aquatic life, water quality or recreational or other beneficial uses . . ." (From § 10.1-559.3 C of the ASA.)

Examples

You Can See It – Suppose an investigator is visiting a farm during a rainstorm. A gully has eroded through the field, so the investigator can actually see the rain washing sediment into the stream. If an investigator can see pollution occurring, he can conclude that the agricultural activity is causing pollution.

Result:

A plan can be required for this field.

You Would See It – If the same investigator were visiting the same farm on a dry day, he would not see the pollution actually occurring. But, given the law of gravity, he can be certain that sediment will be washed from the gully into the stream during future rainstorms. He can be certain that this will cause pollution.

Result:

A plan can be required for this field.

Logic Tells You -- Suppose a complaint alleges that fertilizer is washing from a field into the adjacent stream. The farmer uses fertilizer and does not follow a nutrient management plan. The farmer's fertilizer application rate exceeds the amount required by the crop. The field, which slopes slightly toward the stream, is plowed to within five feet of the stream's edge. Between the field's edge and the stream is a stream bank, which has only thin vegetation. Because of the amount of fertilizer applied, the slope of the field, the law of gravity, and the thin vegetation on the bank, the investigator can be certain that fertilizer will wash from this field into the stream and thus will cause pollution.

Result:

A plan can be required for this field.

You Can't Be Certain – Suppose that in relation to the same complaint, the farmer applies fertilizer, but he follows a nutrient management plan. The amount of fertilizer applied does not exceed the crop's needs and is applied when the crop will use it. In addition, the field is plowed to within 20 feet of the stream's edge, but the buffer and stream bank are thickly vegetated with grass. Because of the farmer's nutrient management practices and the characteristics of the buffer and bank, the investigator cannot be sure the nutrients will wash from this field into the stream.

Result:

A plan cannot be required.

If no plan can be required under the ASA, is this the end of the investigator's relationship with this farmer? Not necessarily. The investigator is free to see if the farmer is receptive to some suggestions on how the farmer might improve his practices to prevent complaints in the future. This educational role of the investigator will be just as important as anything else the investigator does pursuant to the ASA. As a result, water quality can still be improved, and the farmer can enhance his protection against future complaints.

This underscores the importance of the investigator's maintaining a positive, nonjudgmental attitude towards the farmer during the investigation. Even though the investigation may be somewhat upsetting for the farmer, it can be the beginning of a positive new relationship between the farmer and the District or VDACS.

SECTION B - HOW INVESTIGATIONS ARE CONDUCTED

1. Decision to Investigate

The ASA is "complaint-driven." There can be no investigation of any farm activity unless the Commissioner receives a complaint. If the person making the complaint gives his name, the ASA requires that the Commissioner or the local District investigate the validity of the complaint. If the local district performs the investigation, the chairman or his staff turns over evidence within the 21-day investigation period. The ASA gives the Commissioner the choice of whether or not to investigate a complaint that was made anonymously. After the district and/or the Commissioner's staff submit the evidence to the Commissioner, the Commissioner will make the final determination on the complaint's validity.

2. Priority of Complaints

The Commissioner will give top priority to complaints -- non-anonymous or anonymous -- that may prove to be serious and immediate threats to human health, animal health, aquatic life or water quality. The ASA requires that non-anonymous complaints be investigated, and they will receive second priority. Anonymous complaints will receive the lowest priority and may not be investigated at all.

3. Who Investigates

The decision as to who performs the investigation of a complaint really lies with the local District. Upon receiving a complaint, the Commissioner must notify the local District and give the District the option to investigate the complaint. Form 2 shows the standard manner of notification to a District and requests their assistance.

The District then has five days to tell the Commissioner whether or not the District will investigate the complaint. The District may base this decision on anything the District chooses, and the District does not have to tell the Commissioner the reason for its decision. Form 3 is designed to provide the Districts with sample language that they may use in responding to the Commissioner's requests that they investigate.

Some Districts have chosen not to perform any investigations. Once a District has informed the Commissioner that it does not intend to perform investigations, the District does not have to respond to the Commissioner's notification that there is a complaint. As a courtesy, the Commissioner will always inform these Districts of complaints in their Districts so that these Districts will be aware of the situation. Some Districts have chosen to perform all of their investigations jointly with VDACS. This means that representatives of the District and VDACS' ASA staff conduct the investigation together. This approach has worked well, and other Districts are welcome to try this approach.

If a farmer has a preference as to whom performs the investigation, the farmer should let the Commissioner know, and the Commissioner will try to accommodate his request.

4. Time Limitations on Investigations

After receiving the complaint, the Commissioner or the District has 21 days to investigate. If the District conducts the investigation, the District then needs to send their findings to the Commissioner so that he can determine whether a plan is necessary. The Commissioner is responsible for reporting his decision to the farmer.

5. Notice to Farmer of Investigation

The farmer is entitled to notice that a complaint has been received regarding his operation that must be investigated. The notice may come from the Commissioner or from the District. In all cases in which the Commissioner will investigate, his staff in the Virginia Department of Agriculture and Consumer Services ("VDACS") will make the initial phone call to the farmer, following it with a written notice.

Some Districts may feel comfortable in performing investigations, but would prefer to have the initial notice of the investigation come from VDACS. VDACS will make the initial call to the farmer, if the District has adopted a written policy (e.g., a resolution or in meeting minutes) stating that the District wishes to have VDACS make the initial call. If a District has adopted such a policy, the District should send the Commissioner a copy of it. In the initial call, VDACS will explain that a complaint has been received, that an investigation is necessary, and that someone from the District will call to arrange a time to meet. After the District representative calls to arrange a time, the District should follow the phone call with a short letter or memorandum documenting the arrangements. (See Form 5)

Some Districts may prefer to make all pre-investigation contacts with the farmer themselves. Unless VDACS receives a policy from a particular District to the contrary, VDACS will assume that the District will make all of the pre-investigation contacts. The phone call should be documented and followed by a written notice. (See Forms 4 & 5)

Regardless of who makes the initial call, the person who sends the written notice of the investigation to the farmer should also send written information regarding the ASA. (VDACS has provided this information to the Districts.) This gives the farmer an opportunity to get a better understanding of the ASA, its procedures, and what the farmer can expect regarding resolution of the complaint.

6. Notice of Findings from Investigation

The Commissioner will notify the farmer of his decision as to whether a plan is necessary. When a District performs an investigation, they need to provide their findings to the Commissioner so that he can make this decision. This includes all materials produced and collected during the investigation period. (See Form 9.) The Commissioner's notice to the farmer will either dismiss the complaint or inform the farmer that he needs to submit a plan to the Commissioner describing what will be done to correct the pollution problem. This plan is due 60 days after the farmer receives the written notice informing him that a plan is necessary. (See Form 6.) Information regarding planning and implementation will be sent with this notification to assist the farmer. The Commissioner may consider a corrective order if a plan is not submitted within 60 days.

The farmer must begin implementing his plan within six months of receiving notice that a plan is necessary. Then, the farmer must complete implementation of his plan within a period specified by the Commissioner not to exceed 18 months of receiving the notice. The farmer can receive an extension in some cases, as described in Section 7 below.

Upon approving the farmer's plan, the Commissioner will inform the farmer and the District. (See Forms 7 and 8.) Later, the complainant will then be informed that their complaint was founded and that the farmer has agreed to implement solutions to correct the water pollution problem. The farmer has the right to appeal the Commissioner's decision, therefore, notification to the complainant's is delayed until the farmer has an approved Plan.

7. Extensions of Deadlines

Sometimes a farmer may need more time to complete implementation of his plan because of circumstances beyond his control. The ASA provides that the Commissioner may grant an extension of up to six months (180 days) if a hardship exists and if the farmer has made a request for an extension at least 60 days prior to the date he was supposed to have completed implementing his plan. The Commissioner will determine that a situation constitutes a hardship if it was caused by circumstances beyond the farmer's control, and if the farmer has been making a good faith effort to implement his plan. Hardship can include financial problems.

8. Notification of Landowner, if Different from Operator

The Commissioner will determine on a case-by-case basis whether to notify the landowner when the complaint involves an agricultural activity on land that the farmer rents from someone else. If the investigation shows that no pollution problem exists, or if the problem is easily corrected by the operator's change in field management, the Commissioner may determine that notification of the landowner is unnecessary. If the problem involves an old feature (e.g., an old gully) that was created before the present operator began renting the land, or if correcting the problem requires construction, the Commissioner may determine that the landowner needs to be notified.

9. Right of Entry Explained

The ASA gives the Commissioner, his designee, or the District the right to enter the farmer's land to determine whether or not the complaint is valid. This entry onto the farmer's private property must be handled in accordance with the farmer's rights. (See Section F for more information on the farmer's rights.)

a. Constitutional Right

The United States Constitution provides that the *"right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches ... shall not be violated..."*

This is part of the Fourth Amendment (4th Amendment) to the U. S. Constitution, which protects the people against unreasonable searches of their property by the government. The investigation of the complaint is a "search" under the 4th Amendment. Therefore, the right of entry and investigation, like any other governmental entry and investigation, always remain subject to the 4th Amendment, as explained below.

b. Scope of the Right of Entry

The physical scope of the right of entry is determined by the scope of the complaint. If the complaint alleges water pollution created by erosion coming from a specific field on the farm, then the ASA investigator does not have the right to enter other fields. If the complaint is made more broadly to say that erosion is coming from the farm as a whole into X stream, then the investigator's right of entry covers all of the farm that drains into X stream. If the complaint is made even more broadly to say that erosion is coming from the farm as a whole without naming the water body, then the investigator's right of entry covers the whole farm.

Under the 4th Amendment, the ASA's right of entry is subject to further limitations. With the farmer's consent, however, the ASA investigator can enter, examine or do other things:

	<u>Consent Necessary?</u> **
Enter fields not covered by the complaint	Yes
Enter sheds, barns, houses, and other enclosed structures	Yes
Open glove compartments, trunks, tanks, and other containers	Yes
Bring a non-District or non-VDACS person along	Yes
View the farming operation from off-site	No
Enter streams adjacent to farm	No

(**To be valid, consent must be given voluntarily by someone who has the intelligence and ability to understand the situation and the possible consequences. For example, the consent of the farmer's 5-year-old child probably would not work because the child would not understand the consequences.)

Under the ASA, the right to entry is granted to the Commissioner or his designee to enter land that is the subject of a complaint. In addition, the right of entry is also granted on the same land to check implementation of stewardship measures specified in a corrective order and maintenance of stewardship measures.

c. When Right of Entry Begins

Under the ASA, there is no right to enter a specific farm until the Commissioner has received a complaint regarding that particular farm and the farmer has been given notice of the intended entry. The ASA does not require that this notice be in writing, so a phone call or statement to the farmer is sufficient. To prevent misunderstandings, however, VDACS and District investigators should keep records of such phone calls, at a minimum, and follow with a written notice to the farmer to confirm the investigator's oral statements. (See Forms 4 & 5.)

d. Role of the Investigator

The ASA investigator is not a police officer, but a witness who has the right to enter land to conduct an investigation and collect information.

e. Right of Entry

If the farmer denies the investigator entry onto the land or if the farmer later withdraws his consent regarding the investigator's entry, the investigator must leave the farmer's property immediately. The investigator should report this to the VDACS Agricultural Stewardship Coordinator as soon as possible. It may be possible for the Commissioner to obtain a court order allowing entry, and the farmer may be subject to a civil penalty under the ASA.

If a farmer threatens the investigator, then the investigator should leave immediately. The investigator should make no counter-threats nor do anything that could escalate the situation, but maintain a professional manner. The investigator should report the threat to a VDACS Agricultural Stewardship Coordinator immediately, so that VDACS can take over the case.

f. Unclear Situations

If questions arise regarding unclear situations, call the VDACS ASA staff at 804/786-3538, who will try to find the answer.

In the long run, understanding and respecting the farmer's rights is important because violation of Constitutional rights tends to give the government agency and program a bad reputation, eroding public support. In the short run, violation of a person's rights can jeopardize the case. Evidence obtained in violation of the 4th Amendment is likely to be inadmissible in court.

10. Purpose and Scope of Initial Investigation

The purpose of the initial investigation is to answer a single question: Is there substantial evidence that the agricultural activity in question is causing or will cause water pollution from sedimentation, nutrients or toxins, as alleged in the complaint? When performing an investigation, information to answer this question can be recorded on Form 9.

Activities that are causing or will cause pollution that were not the subject of the complaint should be pointed out to the farmer as areas that the farmer needs to address, but with the understanding that these areas are not covered by the ASA complaint. The ASA's jurisdiction is "complaint-driven" and limited to the terms of the complaint. Thus, trying to enforce the ASA's requirements with respect to activities that were not mentioned in the complaint would be impossible.

Examples

The complaint alleges that severe erosion in a farm field bordering a stream is causing pollution. The investigation confirms that this erosion is causing pollution of the stream through sedimentation. During the investigation, the investigator also notices that the farmer's manure-management practices in the nearby loafing lot are also causing pollution. The nutrients from the loafing lot are draining into the stream, but not through the eroded area that was the subject of the complaint.

Result:

The investigator should advise the farmer that the manure also appears to be causing pollution and that the farmer would be wise to correct the situation. An ASA plan can be required, however, only for the erosion problem specified in the complaint.

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Result:

An ASA plan that covers both the manure-management practices and the eroded area can be required, because the nutrients are being delivered to the stream through the eroded area, which was the subject of the complaint.

Sometimes, the question of whether or not a particular activity is covered by the complaint and, thus, should be included in the ASA plan will be difficult to answer. If a District employee or anyone else has a question regarding such a situation, he may call the VDACS ASA staff at 804/786-3538, who will assist in determining the answer.

11. Evidence

The ASA requires that there be "substantial evidence" that the agricultural activity is causing or will cause water pollution. This means that the evidence must be clear and must show cause and effect: that the agricultural activity caused or will cause pollution. In addition, there must be some evidence to support each step in the logical conclusion that activity X caused pollution Y.

a. "Real" Evidence

"Real" evidence is physical evidence (as opposed to testimony). Water samples, maps, and photographs are examples of real evidence. Developing a standard procedure within the office as to the labeling and storage of physical evidence should be done. Keeping physical evidence in locked closets or cabinets is necessary. This will assist VDACS if any enforcement action becomes necessary.

With maps, it will help to know who made the map (e.g., USGS or FSA), whether there have been any changes on the farm since the map was made, and if the map is labeled.

With all physical evidence, investigators need to maintain an unbroken chain of custody (possession). The purpose of the chain of custody is to be able to account for the whereabouts of the evidence at any time between the taking of the evidence and the evidence's arrival at VDACS in connection with an enforcement action. The investigator does not have to prove that no one ever tampered with the sample -- only that the handling of the sample adhered to a system of identification (e.g., labeling) and custody.

b. Transporting Evidence

To maintain the chain of custody, evidence needs to be transported by the investigator, by someone the investigator knows and trusts (and who would be willing to testify, if necessary), or by any standard means that will

provide a receipt (e.g., registered mail, return receipt requested; a private courier service; or a private mail service). For samples to be tested, laboratories are generally aware of chain-of-custody questions and have procedures to prevent chain-of-custody problems. Thus, ASA investigators need to be concerned about custody issues only before the evidence reaches VDACS.

c. Written Evidence

Official publications, such as the Field Office Technical Guide ("FOTG"), are often easily admitted into evidence in court. The rules regarding other types of writings (e.g., the plans) are too complex to go into detail, except to say that original documents are preferred over duplicates (e.g., photocopies). Duplicates are usually admissible, but only if they are exact copies of the original and if the original is unavailable.

d. Oral Testimony

ASA investigators may have to appear as witnesses at hearings pursuant to the ASA. A witness' testimony is just as good evidence as any other kind. It will help the investigator if the investigator keeps notes regarding an investigation.

12. Sample Collection Techniques

To maintain uniformity in the state's system of collecting water samples, VDACS will use the procedures developed by the Virginia Water Control Board (VWCB), as set forth in the applicable sections of VWCB's "Water Quality Assessment Operating Procedures Manual."

Due to the complexity and cost of water and fecal sampling and analysis, samples should be taken only when they are absolutely necessary to prove a case. When an investigator can see that pollutants are entering or will enter the water body in question, he will not need to take samples because the case can be proven through photographs, maps, eye-witness testimony, and the law of gravity. The experience of other states that have programs similar to the ASA suggests that sampling is only necessary in a few cases. For scientific analysis of any water or other evidence, the District investigator should contact a VDACS Agricultural Stewardship Coordinator for specific instructions. VDACS will pay for the scientific analysis of any water or other evidence collected during the investigation period.

SECTION C - CONFIDENTIALITY OF INFORMATION

While an investigation is under way, disclosing information regarding the investigation can, in many cases, compromise or ruin any enforcement actions that may need to be taken later. The farmer may be understandably anxious to review whatever notes and records the investigator has made before the investigation is concluded, but the farmer should not be allowed to do so until the investigation is concluded. If at the conclusion of the investigation the farmer wants to know whether or not he will need to develop a plan, the investigator may give the farmer his opinion, but should also tell the farmer that this is subject to the Commissioner's ultimate decision. At the conclusion of the investigation, the farmer also has the right to review the investigator's materials.

It is inappropriate (perhaps illegal) to disclose information about an on-going investigation to anyone who does not work for the District or VDACS. The farmer's interest in keeping matters regarding an investigation of his practices confidential should be respected. In addition, allowing outside parties (e.g., the press) to, in effect, participate in the investigation by disclosing information about it is likely to compromise the case, in one way or another. Thus, it is essential that all information regarding on-going investigations be kept confidential until the Commissioner has decided whether the farmer needs to develop an ASA plan and, if so, until he has approved the plan.

This confidentiality extends to all aspects of the case, including disclosure of the name of the farmer or the name or location of the farm. For example, if someone (other than the complainant) asks whether Mr. Jones' farming operation is being investigated, the investigator (or anyone else from the District, whether employee or director) should simply respond that the District is unable to say either "yes" or "no" because the District has a strict policy that prohibits discussion of anything related to such matters.

The same principles apply to disclosing information regarding the complainant. Until the investigation is over, neither VDACS nor the District should disclose any information to anyone other than the farmer regarding the complaint. An investigation is over when the Commissioner makes his decision as to whether or not the farmer must develop an ASA plan and if so, has approved the plan.

The District board of directors should go into executive session to discuss any on-going investigations and, if any have been filed, appeals or other litigated matters. In addition, the Board's minutes that will be made available to the public should not disclose information regarding on-going investigations, appeals or other litigated matters. (The Department of Conservation and Recreation has supplied Districts with information on how to go into and out of executive session and related matters.)

A District may receive a request under the Virginia Freedom of Information Act (Chapter 21 (§ 2.1-340 et seq.) of Title 2.1 of the Code of Virginia) ("FOIA") to disclose records regarding an on-going investigation. Each request for records must be made in writing; if a District receives an oral request for records, the District must then advise the person making the request that the request must be made in writing. The District should not respond to any oral requests, only written requests. If the District does receive a written request for records, FOIA gives the District five workdays to respond to the request. (This five-day deadline may be extended under limited circumstances.) If the District receives a written request for records regarding an on-going investigation, the District's response must:

(i) deny disclosure of all records or portions of records that contain information regarding the on-going investigation; (ii) state that records related to on-going investigations are not subject to disclosure; and (iii) cite as authority for denying the records (§§ 2.1-342 A and 10.1-559.9 of the Code of Virginia).

Once an investigation has been concluded, the records regarding it may legally be disclosed, in many instances. To minimize the possibility of FOIA requests made to Districts, the Districts may turn over all of their written material (including notes) and evidence to VDACS. Failure to abide by the requirements of FOIA can subject a District director or employee to personal liability. To minimize their exposure to liability, Districts may choose to not keep copies of matters related to the investigation. VDACS will supply copies to the District later if the District wants them.

The District may decide that it is better policy not to disclose (except pursuant to a FOIA request) the names of farmers involved in ASA matters or locational information regarding their farms, even after the investigations have been concluded. If a District has a question regarding its legal obligations in connection with disclosure of records, the District should pose these to their lawyer or to the local Commonwealth's Attorney who represents the District.

While making records, investigators should remember that the records will be shared with the farmer, in many cases, and, occasionally, the public. These records may even be published in the newspaper or on radio or television. Thus, the investigator should record only accurate, factual information, such as what was seen and even what was said -- never the investigator's opinion of the farmer (or anyone else) as a person. Untrue statements or statements of opinion regarding a person's character, health or looks may constitute slander and, if published, libel.

SECTION D - SUBSEQUENT VISITS TO FARM TO CHECK IMPLEMENTATION

In most cases, once the initial investigation has been completed, no further on-site reviews are necessary if the Commissioner has determined that no plan is necessary. Subsequent on-site reviews are necessary only when an ASA plan is required. The purpose of the subsequent on-site review is to determine whether the farmer is implementing his ASA plan in accordance with his implementation schedule.

Subsequent on-site reviews have enforcement implications, which are the Commissioner's responsibility; so, Districts should not undertake subsequent visits without VDACS' express agreement. (This need for agreement from the Commissioner does not apply to a District's best management practices "spot-check" to determine compliance with a District cost-share agreement, even for a practice installed to meet ASA requirements.)

SECTION E - APPEALS AND FACT-FINDING CONFERENCES

The ASA gives "persons aggrieved" the right to appeal any decision of the Commissioner to the Virginia Soil and Water Conservation Board ("Board"). "Persons aggrieved" means the farmer and may also include anyone else who has a "substantial, immediate pecuniary interest" (e.g., economic harm).

The farmer or other appellant also has the right to request a discussion with the Commissioner before he makes any of these decisions (except the decisions regarding jurisdiction and whether the complaint should be investigated, which will be made before the farmer is aware of the complaint).

If he or she is dissatisfied with the Board's decision in an appeal, a party to the proceeding may then appeal to circuit court. Appeals may be made, in some instances, from circuit court decisions to higher courts.

The ASA provides that the farmer or other appellant may have a informal fact-finding conference before the Commissioner in connection with the issuance of any order pursuant to the ASA. (See e.g., § 10.1-559.4 B of the ASA, which gives the farmer or other appellant the right to a informal fact-finding conference prior to the issuance of a corrective order.) During this proceeding, the informal fact-finding conference, the propriety of the issuance of the order will be determined. An informal fact-finding conference may be more formal than a simple discussion with the Commissioner, if the farmer desires a more formal proceeding.

The term "informal fact-finding conference" comes from Virginia's Administrative Process Act, the statute that sets the basic ground rules and establishes the types of proceedings for appealing decisions made by government agencies or officials. A number of the Commissioner's decisions under the ASA are official decisions that can be appealed, and the way in which an appeal will be conducted is according to the Administrative Process Act's rules for informal fact-finding conferences. These conferences are less formal and less expensive than agency informal fact-finding conference, in which evidence is presented in much the same manner as it would be in a trial in court.

During informal fact-finding conferences and appeals, District investigators and VDACS staff may be called as witnesses. District investigators and VDACS staff have no obligation in these proceedings to make any determinations, but only to provide evidence. Staff from the Department of Conservation and Recreation ("DCR") provides staff services to the Board.

SECTION F - FARMER'S RIGHTS

The farmer always has all of the rights given to him by the U.S. and Virginia Constitutions, and the ASA cannot take those rights away. Of his Constitutional rights, the farmer's right to be protected from unreasonable searches and seizures and the farmer's right to due process would be the greatest concerns in relation to the ASA. The farmer also has the right to consult with his own attorney, if he wishes, in connection with any aspect of, or proceeding under the ASA.

A list that shows the farmer's rights at each stage of the initial investigation is attached.

SECTION G - SOURCES OF ASSISTANCE FOR FARMERS

There are several sources of assistance available to farmers to address pollution problems and to develop stewardship measures and plans. Areas of assistance and possible sources are listed below:

1. Technical Assistance

Planning and, if necessary, engineering assistance is often available through:

- Local Soil and Water Conservation District
- Department of Conservation and Recreation
- Natural Resources Conservation Service
- Virginia Cooperative Extension
- Virginia Department of Agriculture and Consumer Services
- Private businesses

- Consultants
- Agribusiness organizations

2. *Cost-Sharing*

Cost-Share assistance that may be available to implement plans is offered by:

- Local Soil and Water Conservation Districts
- U.S. Department of Agriculture, Farm Service Agency
- U.S. Department of Agriculture, Natural Resources Conservation Service
- Virginia Department of Environmental Quality

3. *Financial Planning*

Financial planning is always a consideration when making decisions that affect a farming operation. There are several organizations that can be of assistance to the farmer in his financial planning:

- Virginia Cooperative Extension (e.g., Farm Management Agents)
- Private financial institutions (e.g., commercial banks, agricultural financing organizations)

4. *Physical Planning for Compliance with ASA*

The ASA requires that the plan be returned to the Commissioner's Office and the District within 60 days after receiving notice that a plan is necessary. The local District must then review the plan. If the plan meets the ASA's requirements, then Commissioner must approve the plan within 30 days after he receives it from the farmer, and send notice of approval to the farmer. The farmer must begin implementing the plan within six months and complete plan implementation within 18 months unless specified differently by the Commissioner. The Commissioner may require an implementation schedule consistent with seasons and other temporal considerations, therefore, increasing the chance of success in establishment or construction of the measures required in the plan. The Commissioner may consider a corrective order if plan implementation schedule is not met or if the problem is not corrected.

A. *Public Sources of assistance in planning*

- Local Soil and Water Conservation District
- Department of Conservation and Recreation
- Natural Resource Conservation Service
- Virginia Cooperative Extension
- Virginia Department of Agriculture and Consumer Services

B. *Private Sources*

- Private businesses (e.g., engineering and consulting firms)
- Agribusiness organizations

C. *Required Contents of Plans*

The following are the minimum requirements of a plan under the ASA:

The plan must include:

- Stewardship measures needed to prevent the pollution, and
- Implementation schedule.

The plan should also include:

- A tract map
- Affected water feature designated- Soils map
- Statement of pollution problem

- Signature page

- Farmer
- Local District
- Commissioner

These plans may be submitted in the simplest form (e.g., in handwriting with photocopies of maps). More sophisticated forms of plans, such as plans developed using the various conservation computer programs, are acceptable, too. Planners simply need to remember that the ASA sets a 60-day deadline for developing the plan, so planners may want to develop simple plans to prevent or eliminate the pollution to meet the 60-day deadline.

The farmer will have received a letter from the Commissioner notifying the farmer of the results of the investigation. This letter specifies the components of the agricultural activity that are causing or will cause water pollution. All of these components must be addressed in the plan.

If necessary, simple plans can be converted into more sophisticated formats later, after this deadline has been met. Planners should be also sensitive to the fact that the farmer then has a second deadline to meet: the farmer must begin implementing the plan within six months of receiving the official notice that the plan has been approved.

Amendments to existing conservation plans are acceptable, too, as long as the amendments prevent or eliminate the pollution.

Form 10 provides an example format of the "bare necessities" of an ASA plan.

To make the planning process most effective, farmers should be given options for solving their pollution problem whenever possible. In terms of appropriate options, the ASA defines stewardship measures as "the best available nonpoint source control methods, technologies, processes, siting criteria, operating methods or other alternatives." There are often a variety of best management practices that can be employed to solve a single pollution problem. Thus, the planner will often have a wide variety of types of options -- from structural practices to changing sites for an activity to changes in operating methods -- that can be offered to the farmer as solutions to the pollution problem. These options need not be the most expensive or employ the most sophisticated technology; they only need to prevent the pollution in question to be the "best".

5. Support & preventative measures -- Roles of agricultural and commodity organizations

The agricultural and commodity organizations can be leaders in supporting their producers and in educating them on Best Management Practices to avoid conflicts and potential pollution problems. As Virginia continues to urbanize, it will become more important for producers to become more aware of environmental concerns and address these issues before problems arise. Some groups have already begun taking action on educating their producers, as described below:

- National Pork Producers Council and the Virginia Pork Industry Association- Environmental Assurance Program
- Virginia Poultry Federation -- nutrient management planning commitment
- Virginia Farm Bureau Federation -- Natural and Environmental Resources Regional Workshops

In addition, Virginia Cooperative Extension has developed an on-farm self-assessment program that can help producers identify potential sources of water pollution. This program is called a Farm*A*Syst.

Local Extension agents can help farmers learn more about Farm*A*Syst. Using Farm*A*Syst can be an important step that farmers can take to prevent certain ground water pollution problems.

SECTION H – VIOLATIONS AND PENALTIES

Under the ASA, no violation occurs until the Commissioner issues a corrective order and the farmer fails to comply with it or if the farmer denies an investigator the right of entry. The Commissioner must issue a corrective order if the farmer is found to need a plan and fails to implement his plan according to the Act's standards.

This means that if a farmer allows the investigator to enter the land and complete the investigation and then develops a plan and implements it according to schedule, the farmer is not in violation of the ASA -- despite the fact that the farmer's operation was causing or would have caused pollution. If the farmer complies with the process establishes by the ASA, he is a "good steward" despite the previous problems because he corrected them.

If a farmer fails to comply, he may be subject to civil penalties and orders issued by either the Commissioner or a court. The ASA does not create any crime -- only civil violations.

SECTION I - INTERGOVERNMENTAL COOPERATION

The ASA requires that agricultural activities that are causing or will cause water pollution be corrected. It is very important that all agencies work together in a cooperative effort using a common-sense approach to assist farmers in effectively correcting these problems. Listed below are agencies and their roles in relation to the ASA.

1. The Department of Environmental Quality and the Virginia Water Control Board ("DEQ" and "VWCB")

Virginia's State Water Control Law gives the VWCB broad jurisdiction over almost all types of water pollution, whether point source or nonpoint source, whether agricultural or nonagricultural in origin, and involving any type of pollutant. (See § 62.1-44.5 of the Code of Virginia.) The ASA gives the Commissioner jurisdiction over a smaller portion of this same area of concern: water pollution caused by three types of pollutants coming from agricultural activities not currently subject to a permit issued by VWCB through DEQ. The Commissioner's and the VWCB's jurisdiction overlap, but the Commissioner's jurisdiction is a subset of the VWCB's. (This concept is illustrated by the figure in Appendix C.)

The VWCB has asserted its jurisdiction over certain types of agricultural operations by requiring them to obtain permits. For those agricultural activities that are subject to a permit issued by the VWCB (through DEQ), the ASA is not applicable. The ASA expressly provides that those operations are exempt from the ASA. When a complaint arises regarding an operation that is subject to a VWCB permit (most often a VPA or VPDES permit), the complaint must be dismissed, and the farmer should be informed that he should check to make certain that the farmer is in compliance with his VWCB permit. The farmer should be given the address and phone number of his regional DEQ office so that DEQ can answer any questions that the farmer may have. After the complaint is dismissed, the complainant will be notified explaining that DEQ's has jurisdiction.

2. The Department of Conservation and Recreation ("DCR")

DCR is Virginia's primary natural resource conservation agency and provides farmers with technical assistance in developing nutrient management plans. In this program, DCR maintains a staff of specialists in field offices throughout the state to provide nutrient management planning (NMP) assistance. Closely connected with the NMP technical assistance program is DCR's certification program for nutrient management planners from both private and public organizations.

In addition to its programs related to NMP, DCR provides the Districts with coordination services at the state level. DCR is the major conduit of funds for Districts. An integral part of this program is the state cost-share program that DCR administers and the Districts implement. In relation to the ASA, DCR can provide its NMP assistance to farmers with corresponding ASA planning needs, as well as cost-share assistance.

DCR collects land-use and related data from across the state to identify small watersheds where the potential for nonpoint source pollution is high. DCR also provides various predictive modeling services that help estimate the progress made in reducing nonpoint source pollution.

Of particular interest to the ASA program is DCR's close relationship with the Virginia Soil and Water Conservation Board ("Board"). DCR provides the staff services to the Board that help the Board meet its ASA obligations.

3. Natural Resources Conservation Service ("NRCS")

The United States Department of Agriculture was formed in response to the "Dust Bowl" that devastated agricultural production in the 1930s and contributed to the Depression. Over the years, the NRCS has developed numerous conservation techniques and practices to conserve, improve and sustain natural resources on private lands. The NRCS pioneered the planning approach to conservation management.

Today, in addition to setting the standards for a wide-variety of conservation practices, the NRCS provides technical assistance to landowners and managers in many localities throughout the state. These technical assistants often work closely with the local Districts. The NRCS also assists other federal agencies in administering the federal cost-share program for agricultural conservation practices. In relation to the ASA, the NRCS continues to provide its technical and cost-share assistance (when and where appropriate) to farmers faced with ASA needs.

4. Virginia Cooperative Extension ("Extension")

Extension has played an important role over the years by providing landowners and managers with education regarding a wide variety of concerns. These educational services range from production matters to farm financial planning to natural resource technical and planning assistance.

In relation to the ASA, Extension continues to provide technical and planning assistance to farmers to prevent complaints under the ASA and to assist in the preparation of ASA plans, at least in those areas where Extension has resources to provide such assistance. Extension's Farm Management Agents, who provide financial planning assistance, may be called upon to provide financial planning assistance in relation to the development of an ASA plan. In response to farmers' questions, Extension is also likely to provide some education to farmers regarding the ASA itself.

5. Soil and Water Conservation Districts ("Districts")

As described in other sections of these guidelines, the Districts may play a role in investigating complaints, if they choose to do so. The decision of whether or not to perform investigations lies with each District individually. Pursuant to the ASA, all Districts will play a role in the ASA by reviewing ASA plans that are being sent to the Commissioner.

As actual political subdivisions of the Commonwealth, the Districts are the local sources of technical and planning assistance for agricultural conservation practices, in many instances. Like the NRCS, the District system was developed in response to the Dust Bowl of the 1930s. Over the decades, the Districts, together with other conservation agencies, have helped produce an advanced agricultural system that blends conservation and resource protection with enhanced production techniques.

The Districts are the local administrators of the cost-share program. Beyond the investigative and review roles that the ASA speaks to directly, the Districts can provide continued planning and technical assistance to farmers with ASA needs. Where and when appropriate, the Districts can provide cost-share assistance.

6. Chesapeake Bay Local Assistance Department ("CBLAD")

The Chesapeake Bay Preservation Act ("Bay Act") was enacted in 1988, and CBLAD was established shortly thereafter to administer the Bay Act's programs.

Section 10.1-559.10 of the ASA makes it clear that any local government may adopt an ordinance establishing a process for filing complaints, investigating them, and creating agricultural stewardship plans where necessary to correct pollution problems, provided that such ordinances meet certain conditions set forth in this section. Subsection B also states that adoption of such ordinances shall not interfere, conflict with, supplant, or otherwise affect any other ordinance previously adopted (prior to July 1, 1996). This includes ordinances adopted pursuant to the Bay Act. If any localities adopt ASA ordinances, these ASA ordinances are intended to supplement and work alongside those other ordinances.

Likewise, § 10.1-559.11 seeks to address potential conflicts with the Bay Act regulations. This section states that nothing in the ASA shall be interpreted to duplicate the agricultural requirements in the regulations adopted pursuant to the Bay Act. In fact, the ASA is intended to supplement and work alongside the Bay Act and its regulations. ASA investigators and planners should note that, while the ASA guidelines seek to provide consistent implementation process across local jurisdictional boundaries, local enforcement of violations of Bay Act ordinances may vary somewhat from one locality to another.

Under the Bay Act regulations and local Bay Act ordinances, agricultural landowners are required to (1) establish (where one does not exist) and maintain a 100-foot-wide vegetated buffer separating the land upon which agricultural activities are being conducted and adjacent environmentally sensitive features, and (2) obtain a soil and water quality conservation plan (SWQCP) addressing erosion, nutrients and pesticides. This plan must be approved by the local District Board. A SWQCP, or parts thereof, is only required to be implemented if a reduction in the width of the 100-foot-buffer is sought.

- If an ASA investigator is informed by the farmer that the farmer has a Bay Act SWQCP, the investigator should review the plan to see what best management practices (BMPs) have been recommended for water quality protection and what is actually being implemented by the farmer.
- In some cases, the ASA investigator may find that the BMP recommended in the SWQCP already addresses the water quality problem complained of, but was not required to be implemented under the Bay Act. Rather than duplicating efforts, the ASA investigator may simply refer to the information in the SWQCP and recommend that the farmer implement any or all relevant parts of the plan that address the identified ASA water quality problem.
- Local governments in Tidewater Virginia may consider the ASA as a way by which the ASA's enforcement mechanisms may be used to further the goals of the Bay Act.
- If an ASA complaint involves a Bay Act vegetated buffer (e.g., a channel has formed in the field and continues through the buffer emptying directly into the stream), the stewardship measures included in the ASA plan must not conflict with either the allowable buffer reductions under the Bay Act regulations or with the buffer performance criteria established via the Bay Act. If the ASA investigator or planner has questions regarding the reduction rules or the performance criteria, the investigator or planner should contact the local CBLAD-funded Agricultural Water Quality Specialist for assistance. The local District should be able to provide the name and telephone number of the Agricultural Water Quality Specialist.

7. Soil & Water Conservation Board ("Board")

As discussed in the previous section of these guidelines entitled "Appeals and Other Fact-Finding Conference," the Board provides the initial forum in which appeals from any of the Commissioner's decision may be heard. This serves to protect important Constitutional rights of farmers and others in obtaining due process. The ASA also empowers the Board to assess, after affording due process, civil penalties against any farmer who has not complied with an order issued pursuant to the ASA.

8. Virginia Department of Agriculture and Consumer Services ("VDACS")

VDACS provides staff assistance to the Commissioner, who is in a sense the "point person" for the ASA. Beyond providing assistance to the Commissioner in investigations and enforcement, VDACS' staff assists in communicating the results of the investigations with complainants.

VDACS also serves as the primary coordinating agency for administering the ASA. In addition to helping draft these guidelines, VDACS initiates the reporting and assessment processes annually. The purposes of the annual reporting and assessment process is to identify trends and needs and to seek means of addressing any problems that develop in the system of administering the ASA.

In some cases, VDACS provides technical and planning assistance to farmers in the wake of a complaint. VDACS' other main role is to coordinate the administration of the ASA with the Districts and other partners. VDACS' main goal in administering the ASA is to institute a "farmer-friendly" set of mechanisms by which farmers can address water pollution problems on a case-by-case basis, without the necessity of further overall regulation.